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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY MARTIN,

Defendant and Appellant.

B212055

(Los Angeles County  
Super. Ct. No. TA085192)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Eleanor J. Hunter, Judge. Affirmed as modified.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C.  
Brenan and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted defendant and appellant Jeffrey Martin of first degree murder and found true, among others, a gang enhancement allegation. At his trial, the People introduced, over objection, rap lyrics written by defendant. Those lyrics included references to gangs and homicide. Defendant contends on appeal that the trial court prejudicially erred by admitting the lyrics. He also contends that his sentence custody credits were miscalculated. We hold that the trial court did not err by admitting the lyrics, although defendant is entitled to an additional day of presentence custody credit. We therefore modify the judgment, and affirm it as modified.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Factual background.

On May 11, 2006, Camilo H. (“Dust”) and Michael Pimental (“Rest”) were hanging out with some friends, including Michael Morales.<sup>1</sup> Later that night, around 9:30 or 10:00 p.m., Camilo and Pimental went for a walk to do some tagging. Camilo wrote “Dust” on a wall.

Co-defendant James Cernogg was on a bicycle. He approached the boys and asked why they were writing on the wall and where did they live.<sup>2</sup> Camilo told him, “ ‘My bad.’ ” Cernogg told Camilo and Pimental to “ ‘[c]ome on’ ” with him. Camilo did not see Cernogg with a gun, but he thought he might have one. Cernogg “chirped” someone on a phone.<sup>3</sup> The first and second times Cernogg called, there was no answer, but the third time he called, somebody answered. Cernogg said, “ ‘I got them right here,’ ” and he was told to “ ‘hold them right there.’ ” Cernogg told Camilo, “ ‘I’m going

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<sup>1</sup> At the time of these events Pimental was 15 and Camilo was 12.

<sup>2</sup> At trial, Camilo identified Cernogg as the man on the bike.

<sup>3</sup> “[C]hirping” is another term for direct connect. By pushing a button on a direct connect phone a person can instantly connect with another phone, similar to a walkie talkie. Phone records introduced at trial showed that calls were made between phones associated with Martin and Cernogg around the time Pimental was shot.

to kill you and your mom.’ ” During this time, Cernogg did not claim a gang or reference the Elm Street Piru gang.

Within minutes, defendant Jeffrey Martin came from the other side of the street. Camilo had seen Martin around the neighborhood “a lot,” “[l]ike 10” times, and knew him as “Slick.” Martin held a gun covered by a rag. Without a word, Martin pointed the gun at Pimental, who said “ ‘No, don’t shoot.’ ” Standing no more than three feet away, Martin shot Pimental once in the head. Pimental died.<sup>4</sup>

Leaving his bike at the scene, Cernogg ran away. Martin walked away, but he and Cernogg went in the same direction, towards Poinsettia. Camilo also ran, until police officers stopped him. They took Camilo to the station, where they showed him photographs. He identified Martin as the shooter, and Cernogg as the person on the bike. In a subsequent live line-up, Camilo identified Martin as the shooter.

Michael Morales witnessed some of these events. Around 10:00 p.m., he went to look for his mother, who had gone to the store. He saw Camilo and Pimental, who looked worried. He saw a Black man on a bike approach Camilo and Pimental and say something to them. The man on the bike asked Morales if he wanted “ ‘some problems, too,’ ” and “ ‘[y]ou better go back.’ ” He pulled up his shirt to expose a gun.<sup>5</sup> The man also said something about teaching them a lesson: “ ‘I’m going to teach these little fools a lesson not to write in my hood again.’ ” At trial, Morales said he did see the person on the bike in court.

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<sup>4</sup> Pimental died from a single gunshot to the head. According to the autopsy, the weapon’s muzzle was within inches of Pimental’s head when the gun was discharged. The bullet, which was recovered from Pimental’s head, could have been fired from a 380, a nine-millimeter Luger, a .38 special or a 357 Magnum. The characteristics of the bullet are more consistent with a 380 semiautomatic.

<sup>5</sup> Morales testified he told the police that the man on the bike had a gun. But the parties stipulated that neither during his interview on May 13, 2006 nor in subsequent interviews, did Morales tell a detective that the man on the bike pulled up his shirt to display a gun in his waistband.

DNA samples were retrieved from the bicycle left at the scene of the crime. Cernogg was a possible contributor to the DNA. As to one DNA sample, one of 24,940 African-Americans could have contributed to that DNA. As to a second DNA sample, one out of 15,140 African-Americans could have contributed to it.

After he was arrested for Pimental's murder, Martin's jail cell conversations were monitored and recorded. In one conversation, Martin sang rap lyrics he wrote: " 'We don't do drive-bys, walk up on you, now it's a homicide' "; " 'I will be on that chirp' "; " 'Those chirps boy, will have your ass laid out. Chirps, man, chirps they made that, that's some cold shit. That's to get a nigga into quick in contact with a nigga . . . though you ain't got to wait for the phone to ring, pick it up or none of that. Bust, ready to bust through.' "

Detective Peter Hecht has been a gang investigator for seven years. He is familiar with the Elm Street or Elm Lane Piru gang in Compton. The gang's symbols include ESP and ELP and Piru and Elm. Graffiti is a way of marking the gang's turf. The gang's primary activities include murders, robberies, armed assaults, and carjackings and narcotic sales. Elm has less than 50, but more than 3 members and the gang's turf borders Compton Boulevard to the south, Rosecrans Avenue to the north, Long Beach Boulevard to the east, and Santa Fe Avenue to the west. Once a gang establishes its territory, the vast majority of crimes the gang commits occur inside their turf, where they have a hold on the community. A person that is an "associate" is someone who just hangs out with the gang. But once an associate starts committing criminal acts with the gang, he or she is working in concert with the gang.

If someone tags in a gang's neighborhood, on top of that gang's own graffiti, that is seen as a challenge, as disrespecting the gang. If the tagger is caught, there is almost always some type of confrontation or challenge—"they're going to hit them up" and "usually these types of confrontations end violently." But not all such confrontations will turn violent: "Sometimes it's just a matter of the gang members telling the vandals, you know, hey, get out of our neighborhood. You cannot tag our neighborhood."

Nonetheless, such confrontations can end in murder and “frequently” they result in gunfire.

Detective Hecht arrested Martin on other occasions and had contacts with him in the field. In the detective’s opinion, Martin is an Elm Street Piru gang member. Martin, whose moniker is Slick, self-admitted his gang membership to the detective. Based on Cernogg’s contacts with other deputies while in the company of Elm Street Piru members, Detective Hecht believes that he is an associate of the gang.

Detective Hecht was presented with the following scenario: Two young Hispanic males go to the area of Rosecrans and Poinsettia after 10:00 p.m. and tag property that already contains Elm Street Piru graffiti. While tagging, Cernogg stops them, asking, “why are you writing” or “why are you tagging my wall.” Cernogg chirps Martin who says, “ ‘[h]old them, I’ll be right there[.]’ ” Armed with a gun, Martin soon arrives and shoots one boy. Based on these facts, Detective Hecht testified it is his opinion that the crime was committed for the benefit of, at the direction of, or in association with Elm Street Piru. The crime was committed to maintain respect for the gang.

## **II. Procedural background.**

Trial was by jury. On March 5, 2008, the jury found Martin guilty of first degree murder (Pen. Code, § 187, subd. (a)).<sup>6</sup> The jury found true gun-use allegations (§ 12022.53, subds. (b), (c) & (d)) and a gang-enhancement allegation (§ 186.22, subd. (b)(1)(A)).<sup>7</sup>

After denying Martin’s motion for a new trial, which raised the issue of the trial court’s failure to exclude the jailhouse recordings, the court sentenced Martin on August 18, 2008. Martin was sentenced to 25-years-to-life doubled to 50 years, based on a finding that Martin suffered a prior conviction for a violation of section 245, subdivision (a)(2). The court sentenced him to an additional 25-years-to-life term for the

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<sup>6</sup> All further undesignated statutory references are to the Penal Code.

<sup>7</sup> The jury also found Cernogg guilty of first degree murder and of related-gun and gang-enhancement allegations.

gun use enhancement (§ 12022.53, subd. (d)). The court stayed any sentence for the gang enhancement.

## DISCUSSION

### I. Admissibility of rap lyrics containing gang references.

The trial court admitted jailhouse recordings of Martin singing rap lyrics containing gang references. He now contends that the admission of that evidence was an abuse of the trial court's discretion and violated his federal due process rights.

#### A. *Martin's rap lyrics.*

Martin's defense counsel objected to the admission of various recordings of jailhouse conversations involving Martin, which included him singing rap lyrics he said he wrote. Counsel argued that Martin wrote the lyrics before the crimes occurred in this case; therefore, they could not relate to Pimental's murder. The court found the rap lyrics to be relevant to defendant's gang membership and not unduly prejudicial.

The recording was later played for the jury:

"Martin. I don't remember my shit though, but I'm trying to remember this one . . . (rapping) gangster, gangster, uh-huh, gangster, gangster, yeah nigger. Gangster, gangster for sho, gangster, gangster, you know. Gangster, gangster so-ooo. Gangster, gangster, cut red. Gangster, gangster, yeah that's me, uh, gangster, gangster, 'RU's' nigger. Gangster. Let me tell [you] about the G's bred in the state which is full of palm trees. Gangster. We stay rolling on B's, smoking on that California bomb no seeds gangster, and your bitch love that. Hopping out the 6-4 with the front and back. Gangster, she like'd it . . . gangster, she like it when the khakis sag hanging out the back cause (INAUDIBLE). Gangster, nigga we bang for life. Try to shut it down now, (INAUDIBLE). Gangster, we don't do drive-bys, walk up on you now, it's a homicide. Gangster. Originated on the West Coast, come to L.A., and the smoke is really gun smoke. Gangster. Crip nigger say loc. And Blood say dawg, but we both ain't no joke we gangster, gangster, uh-huh. Gangster, gangster. Yeah, nigga. Gangster, gangster for sho. Gangster, gangster, you know. Gangster, gangster. So-ooo. Gangster, gangster, cut red. Gangster, gangster, yeah that's me. Gangster, gangster 'RU's' nigger. Gangster this

ain't a motherfuckin' movie. Stopped at a red light a nigger try to do me. Gangster, the big them thought they knew me 'cause I'm braided up and my arms tatted up. Gangster. They pick me out of line up. Only evidence they got on me is a red Chucks. Gangster. Bitch we got big nuts. Niggers on parole on swole from doing push ups. Gangster. I know you niggers heard about it. California with the most pens overcrowded. Gangster, it makes a nigga want to shout it. We'd rather get caught with it then be without it. Gangster and that's a real cold fact. You better be ready when the steel gauge racked. Gangster. You don't know about that, you aint a G cause gangster's get down like that. That's some shit I wrote. I forgot the second verse to it though.

“Male #1. That's not bad, that's not bad at all. Man, you need to put your stuff up on those . . . some records man.

“Martin. I got like 15 songs that I written. The last time I was in here homey. I was doing them all in the hole and shit. Uh, with a nigger, High Top, . . .”

B. *The trial court did not abuse its discretion by admitting the rap lyrics.*

“Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative.” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) It should not be admitted where its sole relevance is to show a defendant's criminal disposition or bad character; in other words, to create an inference that the defendant committed the charged offense. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1450.) But where there is a gang allegation, gang evidence will usually be admissible. (See, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 [“It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation”].)

The specific type of gang evidence at issue, rap lyrics containing gang references, has also been found to be admissible. (*People v. Olguin* (1994) 31 Cal.App.4th 1355.) In that case, Olguin, accompanied by fellow gang members, shot the victim, who had yelled out the name of a rival gang. Three weeks after the shooting, rap lyrics were found in the home of one of Olguin's companions. The lyrics included references to their gang. (*Id.*

at p. 1372.) The Court of Appeal first noted that a trial court has broad discretion to admit or to exclude evidence under Evidence Code section 352. (*Olguin*, at p. 1373; accord *People v. Zepeda* (2008) 167 Cal.App.4th 25, 34-35.) “ ‘Where . . . a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*Olguin*, at p. 1373.) Under that standard, the lyrics were relevant. The crime at issue was alleged to be gang-related, and the rap lyrics tended to show membership in a gang. Therefore, the court dismissed *Olguin*’s complaint that the lyrics were inadmissible character evidence.

Martin tries to distinguish *Olguin* by arguing that the lyrics here were not germane to any issue about the nature of the charged offense, in part because he wrote the song *before* the charged offense, Pimental’s murder, occurred. That may be true, but it does not render the lyrics irrelevant. They were still relevant to Martin’s gang membership. Moreover, Martin’s lyric’s include the line, “Gangster, we don’t do drive-bys, walk up on you now, it’s a homicide.” Even if Martin wrote this line before Pimental was shot during a “walk up,” the lyric shows Martin’s state of mind; namely, instead of drive-by shootings, he walks up to people and shoots them. (See, e.g., *People v. Zepeda*, *supra*, 167 Cal.App.4th at p. 35 [rap lyrics were probative of defendant’s state of mind and criminal intent].) His song thus perfectly describes the crime that occurred.

Conceding that his song tends to prove his membership in a gang, Martin nonetheless argues that the evidence was cumulative of an undisputed issue that was well-established by other evidence, for example, gang expert testimony. A similar argument was made and rejected in *People v. Zepeda*, *supra*, 167 Cal.App.4th at page 35. In *Zepeda*, two of six song tracks were played to the jury. The court said that the tracks differed in context from other evidence of the defendant’s gang membership (e.g., tattoos, drawings, notebooks and photographs of him flashing gang signs). (*Ibid.*) Although here other evidence established Martin’s gang membership, we cannot say it was cumulative, given that he sang so directly about the type of crime that was the subject of the case—



walking up to a person and shooting them. We therefore agree with *Zepeda* when it states: “The language and substance of the lyrics, although graphic, did not arise to the level of evoking an emotional bias against defendant as an individual apart from what the facts proved.” (*Ibid.*)

C. *Admission of the rap lyrics did not violate Martin’s federal due process rights.*

In addition to state law error, Martin also claims that admission of the lyrics violated his federal due process rights.<sup>8</sup> “[A]dmission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.” (*People v. Partida* (2005) 37 Cal.4th 428, 439.) We have found that it was not error to admit the lyrics. And, as we have indicated, there was nothing fundamentally unfair about admitting them. Martin wrote a song alluding to the specific type of “walk up shooting” that happened here. Accordingly, no violation of Martin’s federal due process rights occurred.

## **II. Defendant was entitled to an additional day of presentence custody credit.**

Martin was awarded 823 days of presentence custody credits. He contends, and the People concede, that he is entitled to one more day of credit.

Under section 2900.5, all days a defendant spends in custody shall be credited to the defendant upon his or her term of imprisonment. Each day of custody is counted, including the first day and the day of sentencing. (*People v. Downey* (2000) 82 Cal.App.4th 899, 920.) Martin was arrested on May 18, 2006. He was sentenced on August 18, 2008. He is therefore entitled to 824 days of presentence custody credits.

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<sup>8</sup> Martin did not object in the trial court to admission of the lyrics on federal constitutional grounds. Putting aside the issue of forfeiture, we will address the issue.

### **DISPOSITION**

The abstract of judgment is modified to reflect that defendant and appellant Jeffrey Martin is entitled to 824 days of presentence custody credits. The clerk of the superior court is directed to modify the abstract of judgment and to forward the modified abstract to the Department of Corrections. The judgment is otherwise affirmed as modified.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.